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No. 89-1517

In the Supreme Court of the United States

OCTOBER TERM, 1990

KENNETH LINN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court should have instructed the jury that, in order to convict petitioner of conducting a continuing criminal enterprise, it would have to agree unanimously on the identities of five individuals whom he supervised.

2. Whether the district court should have instructed the jury that, in determining whether petitioner supervised at least five individuals, it could not consider the two attorneys who assisted petitioner's drug-trafficking enterprise, because they were not listed among the alleged subordinates in the bill of particulars.

3. Whether the district court should have given a jury instruction limiting the individuals who could be considered as petitioner's subordinates to those whom the court allowed the government to identify in its closing argument.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 889 F.2d 1369.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 1989. The petition for rehearing was denied on December 28, 1989. The petition for a writ of certiorari was filed on March 28, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was con-

victed on one count of conducting a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848;[1] nine counts of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); one count of conspiring to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; and seven counts of using a telephone to facilitate a drug offense, in violation of 21 U.S.C. 843(b). He was sentenced to 25 years' imprisonment. The court of appeals affirmed. Pet. App. 1a-19a.

1. The evidence at trial showed that petitioner operated a cocaine trafficking business. Pet. App. 4a. Petitioner obtained the cocaine from three independent sources. The primary source was identified only as "Chico." The other two sources were Leo Rodesta, who was also convicted of operating a CCE, and Justin Durbin. *Ibid.* Petitioner, sometimes using the alias "Robert Falino," operated his drug business largely through two corporations, Middle Eastern Ventures and International Marketing & Development. Middle Eastern Ventures owned the house where petitioner weighed, tested, cut, and packaged the cocaine for distribution. Both corporations held post office boxes where proceeds from sales were received, as well as safety deposit boxes that were used to store cash and cocaine. *Id.* at 6a.

Petitioner set his own prices and decided which of his buyers would be "fronted" the cocaine and which would be

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[1] Section 848(c) of Title 21, provides in part that:

a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and;

(B) from which such person obtains substantial income or resources.

required to pay in advance. Pet. App. 5a. Occasionally, petitioner arranged to send cocaine to the buyer via express mail. The buyers included William Burns, Robert Collins, Mike Rouperich, Michael Colvin, Nick Popich, and Justin Durbin. *Id.* at 4a-5a.

Petitioner was assisted in his distribution scheme by Flo Burke, his girlfriend, and Charles Brazel. Burke served as petitioner's messenger, often picking up packages of money sent by buyers. Brazel acted as a go-between, arranging for petitioner to ship cocaine to a post office box for buyer Colvin, and making arrangements for Colvin to pay petitioner. Brazel also was responsible for putting pressure on Colvin when Colvin failed to pay according to plan. Pet. App. 5a-6a.

Petitioner engaged the services of two attorneys, Frank Diaz and Robert Dane Smith, as well as a money launderer, Rudolph Keys, to assist in hiding and laundering the proceeds of his drug operation. Keys assisted petitioner in bringing $320,000 in cash out of the United States and into the Turks & Caicos Islands. Eventually, the money was transferred back to the United States and used to buy a residence in California. Attorney Smith's name appeared on documents relating to a safety deposit box used to store cocaine and cocaine proceeds. Attorney Diaz, who had an interest in the Hemisphere National Bank in Miami, agreed to allow petitioner to deposit large sums of money into an account at that bank without filing notification forms with the IRS. Diaz also held a power of attorney that allowed petitioner to gain access to a post office box for receipt of cocaine payments. Pet. App. 6a-8a.

2. Prior to trial, petitioner moved for a bill of particulars specifying the individuals he was alleged to have supervised. The government supplied a list of names, not including attorneys Diaz and Smith. During trial, the government introduced evidence concerning the activities of Diaz and

Smith. Petitioner did not object to the admission of that evidence, nor did he request a limiting instruction. Pet. App. 8a-9a.

Prior to closing argument, petitioner filed three *in limine* motions. First, he requested that the government be instructed not to argue that he supervised any of the individuals listed in the bill of particulars, except for two. Second, petitioner requested that the court direct the government not to argue that petitioner supervised Diaz and Smith. Third, petitioner requested the court to direct the government to name in its summation all those persons whom it contended petitioner had supervised. The court granted the second and third motions, and granted the first motion in part by limiting the government's argument to only 10 of the individuals identified in the bill of particulars. But the district court denied petitioner's request for an instruction limiting the jury to consideration of those 10 individuals as possible subordinates for purposes of the CCE count. Pet. App. 10a-11a.

4. On appeal, petitioner contended, first, that by failing to prohibit the jury from considering Diaz and Smith as petitioner's subordinates, the court caused a prejudicial variance from the bill of particulars. In rejecting that claim, the court explained that a bill of particulars "does not create in the defendant an entitlement [to] an instruction reflecting the contents of the bill of particulars." Pet. App. 13a. Although the court expressed doubt that petitioner was surprised by the alleged variance, it found it unnecessary "to peer into [petitioner's] psyche." *Id.* at 15a. Rather, the court of appeals concluded that any variance from the bill of particulars was harmless because (1) the district court had granted petitioner's motion to prevent the government from arguing in its summation that Diaz and Smith could be included among the five or more persons petitioner supervised; (2) the defense had itself in closing argument itemized the

persons who could be considered as subordinates; (3) the government had offered five names to the jury, not including Diaz or Smith; and (4) the evidence was sufficient to show that petitioner supervised those five. *Id.* at 15a-16a.

The court of appeals also rejected petitioner's contention that the district court should have required the jury to agree unanimously on the identity of each of the five subordinates. The court reasoned that the CCE statute "does not make the identity of the five subordinates important since [it] is directed against all enterprises of a certain size." Pet. App. 19a. The court concluded that, "[s]o long as the jurors unanimously agree that the defendant supervised, organized, or managed any five persons, this element of a CCE violation is satisfied." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 49-52) that the district court should have instructed the jury that, in order to convict him on the CCE count, it must agree unanimously on the identity of each of the five individuals whom he supervised. Every court of appeals that has addressed this issue has declined to require such agreement. See *United States* v. *Jackson*, 879 F.2d 85, 86-90 (3d Cir. 1989); *United States* v. *Tarvers*, 833 F.2d 1068, 1073-1075 (1st Cir. 1987); *United States* v. *Markowski*, 772 F.2d 358, 364 (7th Cir. 1985), cert. denied, 475 U.S. 1018 (1986). Cf. *United States* v. *Raffone*, 693 F.2d 1343, 1347-1348 (11th Cir. 1982) (absent a request to do so, district court's refusal to give such an instruction not plain error), cert. denied, 461 U.S. 931 (1983). In *Tarvers*, the First Circuit approved a jury instruction expressly stating that the jurors did not have to agree unanimously on the subordinates' identities. 833 F.2d at 1074.

The courts of appeals correctly recognize that the CCE statute is concerned with the size of the criminal enterprise, not the identities of the subordinates supervised by the defendant. See *Markowski*, 772 F.2d at 364. The purpose of the "five subordinate" element of the CCE offense is to establish that "the organization in which the defendant played a leadership role was sufficiently large to warrant the enhanced punishment provided by the * * * statute." *Jackson*, 879 F.2d at 88. Accordingly, the issue for the jury is not the identity of each of the subordinates, but simply whether the defendant exercised "the requisite degree of supervisory authority over a sizeable enterprise." *Id.* at 88-89. Requiring the jury to agree unanimously on the identities of each of the subordinates would be contrary to the principle that jurors need not agree on the "specific fact[s] underlying an element" of a crime so long as they reach a consensus on the element itself. *Tarvers*, 833 F.2d at 1074. If unanimity were required as to the identities of the subordinates in a CCE prosecution, then "there would be no principled reason not to require [a unanimity] instruction as to virtually every factual element in any conspiracy count, including the identities of the co-conspirators and the overt acts." 879 F.2d at 88.

Petitioner's reliance on *United States* v. *Echeverri*, 854 F.2d 638, 643 (3d Cir. 1988), is unavailing. In *Echeverri*, the Third Circuit held that where, in proving the "continuing series of violations" element of a CCE offense, the government introduced evidence tending to show numerous alleged violations, any three of which could have been the focus of a particular juror, the district court's general unanimity instruction was insufficient. 854 F.2d at 642. Whatever the merits of that decision, it does not support petitioner's argument here. In *United States* v. *Jackson*, *supra*, the Third Circuit expressly held that juror unanimity is not required as to the identities of the five subordinates,

and distinguished *Echeverri*. As the *Jackson* court explained, "[t]he failure to give a specific unanimity charge or [instruction] in * * * *Echeverri* left open the possibility that [the] named defendants could have been convicted without substantial agreement by the jurors as to what criminal acts they performed." 879 F.2d at 89. "In contrast," the court continued, "precise details such as the identities of the underlings are not an essential element of the CCE offense but merely historical facts as to which the jurors could have disagreed without undermining their substantial agreement as to the ultimate and essential fact of whether the requisite size and level of control existed." *Ibid.*

2. Next, petitioner contends (Pet. 56-60) that the district court should have instructed the jury that it could not consider attorneys Diaz and Smith in determining whether petitioner supervised at least five individuals, because the two attorneys were not listed by the government as potential subordinates in its bill of particulars. As an initial matter, petitioner failed to preserve this claim at trial by neglecting to request an instruction specifically disqualifying Diaz and Smith from consideration as potential subordinates.[2] See Pet. App. 13a n.4. In any event, the government's failure to list Diaz and Smith in the bill of particulars did not disqualify them from consideration as potential subordinates. The purposes of a bill of particulars are to minimize surprise at trial and to aid the defendant in preparing his defense. *United States* v. *Burt*, 765 F.2d 1364, 1367 (9th Cir. 1985); *United States* v. *Johnson*, 575 F.2d 1347, 1356 (5th Cir 1978), cert. denied, 440 U.S. 907 (1979). In the

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[2] Petitioner sought an instruction limiting the individuals who could be considered as subordinates to the 10 persons, not including Diaz and Smith, whom the court allowed the government to identify in its summation. But petitioner never suggested that the instruction was needed on the ground that Diaz and Smith were not listed in the bill of particulars. 11 Tr. 128, 170-171.

absence of surprise or prejudice, the courts of appeals have held that "there is no absolute requirement that the government name more than five supervisees, or even that the supervisees be identified at all." *Burt*, 765 F.2d at 1367. See also *United States* v. *Zanzucchi*, 892 F.2d 56, 58 (9th Cir. 1989); *United States* v. *Rosa*, 891 F.2d 1063, 1067 (3d Cir. 1989); *United States* v. *Hawkins*, 661 F.2d 436, 451-452 (5th Cir. 1981), cert. denied, 456 U.S. 991 (1982). Here, petitioner makes no effort to demonstrate surprise or prejudice stemming from the failure to name Diaz and Smith in the bill of particulars. The court of appeals observed that petitioner failed to object to the evidence concerning Diaz and Smith when it was introduced, and expressed doubt that the alleged variance caused petitioner any surprise. Pet. App. 15a. In addition, any error in the district court's failure to instruct the jury that Diaz and Smith could not be considered as potential subordinates was harmless. In closing argument, both defense counsel and the government made use of a chart listing the persons who could be considered as potential subordinates. The names of Diaz and Smith were not listed on the chart. Pet. App. 16a. During its closing argument, the government suggested five supervisees to the jury, not including Diaz or Smith. *Ibid.* And, as the court of appeals held (*id.* at 16a-17a), the evidence supported a determination that petitioner supervised at least five underlings other than the two attorneys. In these circumstances, petitioner was not prejudiced by any possible variance between the bill of particulars and the proof at trial. *Id.* at 15a-16a.

3. Finally, petitioner contends (Pet. 52-56) that the district court should have given an instruction limiting the jury to considering as possible subordinates only those individuals whom the court allowed the government to mention in its closing argument. Petitioner argues that such an instruction was necessary because the district court, in

limiting the number of alleged subordinates the government could identify, held that the evidence was insufficient to show that he supervised anyone else. In fact, the district court did not so hold. In response to petitioner's motion that the government be barred from arguing that petitioner supervised any of the individuals named in the bill of particulars, except for two, the court asked government counsel on whom it intended to rely for the five subordinates. When the government listed ten individuals, the court ordered the government to confine itself in closing argument to identifying only those ten. 11 Tr. 6-10. The district court did not hold that the evidence of supervision was insufficient as to any other possible subordinate. Accordingly, petitioner is incorrect in arguing that the district court's restriction on the government's closing argument necessitated a corresponding instruction to the jury.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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